IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

WRIT PETITION NO.44 OF 2004

...

Indian Rare Earths Ltd. & Anr. ...Petitioners

v/s.

The Workmen, through Honorary Secretary of the IREL Canteen Employees Welfare Association and ors. ...Respondents

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Mr.J.P.Cama with Ms.V.Srivastava i/b Consulta Juris for the Petitioners.

Mr.Jay Prakash Sawant for the Respondents.

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**CORAM: D.K.DESHMUKH, J.**

**DATED:** 26TH JULY, 2006

**P.C.:**

1. By this petition the Petitioners challenge the award made by the Central Government Industrial Tribunal No.2, Mumbai dated 19-5-2003.

2. By that award it is declared that the action of the management of Indian Rare Earths Ltd., in not absorbing the service of Mrs.Sujata S. Sardesai and 19 other employees who are members of the Respondent No.1 in the Petitioner No.1's services is neither legal nor justified. The Industrial Tribunal has further directed that the petitioner No.1/Indian Rare Earths Ltd. and the Petitioner No.2/ Union of India to absorb the workmen in their regular service as per rules within four months from the date of the award.

3. Challenge to the award on behalf of the Petitioner No.2/Union of India is that to the reference that was made by the appropriate Government, the Union of India/Petitioner No.2 was not a party. Therefore, the Industrial Tribunal was neither justified in directing addition of Union of

India as a party nor was the industrial tribunal justified in issuing directions against the Petitioner No.2/Union of India against which the dispute was not referred by the appropriate Government. The principal challenge to the award on behalf of the Petitioner No.2 is that the Thorium Plant of the Petitioner No.1 was closed with effect from 1-4-1998 and therefore the workers of the canteen cannot claim regularisation in the Thorium Plant of the Petitioner No.1.

4. So far as the challenge on behalf of the Petitioner No.1 is concerned, the learned Counsel appearing for the Petitioners submits that in accordance with the provisions of the Industrial Dispute Act, the Tribunal to whom reference is made is entitled to issue directions and make award only against the entities which are parties to the award. The Industrial Tribunal can not exercise it power of summoning the parties to make the principal award itself against such a party against which a dispute is not referred by the appropriate Government.

5. In so as the principal challenge to the award on behalf of the Petitioner No.2 is concerned, it is

submitted that the Thorium Plant of the Petitioner No.1 company in relation to which the canteen where the workmen were being employed itself was closed down, there is no question of their absorption in service. It is submitted that even the Industrial Court has found that the Thorium Plant is closed and therefore it has directed absorption of the services of the workmen in the service of the Petitioner No.2.

6. On behalf of the Respondents, on the other hand, it is submitted that though it is true that to the dispute that was referred by the appropriate Government the Petitioner No.2/Union of India was not a party, it was added as a party by the order made by the Industrial Court and therefore, in terms of the provisions of sub-section 3 of Section 18, the Industrial Court has the power to issue directions against the added party. In support of this submission reliance is placed on the judgment of the Supreme Court in the case of Hochtief Gammon v/s. Industrial Tribunal, Bhubaneshwar, Orissa and ors, AIR 1964 SC 1746. It is submitted that as the Union of India is party to the award, the award is binding on it, and therefore, the Industrial Court had the power to make an award against the Union of India.

So far as the principal challenge to the award raised on behalf of the Petitioner No.2 is concerned, the learned Counsel appearing for the Respondents submits that though the Thorium Plant of the Petitioner No.1 in Bombay is closed, it is running the plant somewhere else and therefore, absorption in service of the workmen could not have been denied by the Petitioner No.1 on the ground that its Thorium Plant in Mumbai is closed.

7. Now, so far as the first ground is concerned, there is an admitted position that to the reference made by the appropriate Government the Petitioner No.2 was not a party. Union of India was subsequently added as a party by the order of the Tribunal. In the petition, the Petitioners have challenged the order of the Industrial Tribunal directing addition of the Petitioner No.2 as a party and they have also challenged the directions issued by the Tribunal against the Petitioner No.2/Union of India. Perusal of the provisions of the Industrial Disputes Act shows that the reference of dispute can be made only by the appropriate Government and it is that dispute which is decided by the Tribunal. Perusal of the provisions of sub-section 5 of Section

10 of the Industrial Disputes Act shows that when the appropriate Government has referred a dispute and it is pointed out to the appropriate Government that some other party is likely to be affected by the decision on the dispute then the appropriate Government can add that party to the reference. To my mind, thus, it is clear that if it is found that the award is required to be made after adjudication of the dispute against the entity which is not a party to the reference, then proper procedure is to approach the appropriate Government for addition of that entity as a party to the reference. Sub-section 3 of Section 18 lays down that an award made by the Industrial Tribunal is binding on other parties summoned to appear in the proceedings. Sub-section 3 of Section 18 cannot be read to confer power on the tribunal to make principal award against the added party. Power to add a party for the purpose of making an award against that party is with the appropriate Government. The Act does not confer that power on the Industrial Tribunal to whom the dispute is referred. In my opinion, in this connection the observations made by the Supreme Court in the case of Hochtief Gammon in paragraph 12 are relevant. They read as under:-

12. Reverting then to the question as to the effect of the power which is implied in S.18(3) (b), it is clear that this power cannot be exercised by the Tribunal so as to enlarge materially the scope of the reference itself, because basically the jurisdiction of the Tribunal to deal with an industrial dispute is derived solely from the order of reference passed by the appropriate Government under S.10(1). What the Tribunal can consider in addition to the disputes specified in the order of reference, are only matters incidental to the said disputes; and that naturally suggests certain obvious limitations on the implied power of the Tribunal to add parties to the reference before it, purporting to exercise its implied power under S.18(3)(b). If it appears to the Tribunal that a party to the industrial dispute named in the order of reference does not completely or adequately represent the interest either on the side of the employer, or on the side of the employee, it may direct that other persons should be joined who would be necessary to

> represent such interest. If the employer named in a reference does not fully represent the interests of the employer as such, other persons who are interested in the undertaking of the employer may be joined. Similarly, if the unions specified in the reference do not represent all the employees of the undertaking, it may be open to the Tribunal to add such other unions as it may deem necessary. The test always must be is the addition of the party necessary to make adjudication itself effective and enforceable? In other words, the test may well be, would the non-joinder of the party make the arbitration proceedings ineffective and unenforceable? It is in the light of this test that the implied power of the Tribunal to add parties must be held to be limited.

9. It is clear from the observations of the Supreme Court in paragraph 12 quoted above that the power of the Tribunal to add parties cannot be exercised by the Tribunal so as to enlarge materially the scope of the reference itself. The scope of the reference that was made by the appropriate Government in this

case was whether the workmen can be absorbed in service of the Petitioner No.1 which is a company incorporated under the Companies Act. If the Union of India was to be added as a party to the reference so as to direct absorption of the workmen in the service of the Union of India, it would amount to materially enlarging the scope of the reference, which power vests with the appropriate Government and not with the tribunal. In my opinion, therefore, the tribunal was not really justified in directing addition of the Union of India as a party.

10. For the second significant aspect of the matter observations of the Supreme Court in paragraph 17 of the judgment in case of Hochtief Gammon are relevant. They read as under:-

> 17. The next contention raised by Mr.Chatterji is that M/s.Hindustan Steel Ltd. is a necessary party because it is the said concern which is the employer of the respondents and not the appellant. In other words, this contention is that though in form the appellant engaged the workmen whom the respondent union represents, the appellant was

acting as the agent of its principal and for adjudicating upon the industrial dispute referred to the Tribunal by the State of Orissa, it is necessary that the principal, viz., M/s.Hindustan Steel Ltd. ought to be added as a party. In dealing with this argument, it is necessary to bear in mind the fact that the appellant does not dispute the respondent Union's case that the workmen were employed by the appellant. It would have been open to the State Government to ask the Tribunal to consider who was the employer of these workmen and int hat case the terms of reference might have been suitably framed. Where the appropriate Government desires that the question as to who the employer is should be determined, it generally makes a reference in wide enough terms and includes as parties to the reference different persons who are alleged to be the employers. Such a course has not been adopted in the present proceedings, and so, it would not be possible to hold that the question as to who is the employer as between the appellant and M/s.Hindustan Steel Ltd. is a question

> incidental to the industrial dispute which has been referred under S.10(1)(d). This dispute is a substantial dispute between the appellant and M/s.Hindustan Steel Ltd. and cannot be regarded as incidental in any sense, and so, we think that even this ground is not sufficient to justify the contention that M/s.Hindustan Steel Ltd. is a necessary party which can be added and summoned under the implied powers of the Tribunal under S.18(3)(b).

11. It is clear from the observations of the Supreme Court quoted above that if the appropriate government wants the question as to who is the real employer to be enquired into, the appropriate government makes a reference to that effect. In otherwords, in the absence of the appropriate government making a reference in that regard the tribunal can not decide the question as to who is the real employer. In the present case, as the workmen were claiming to be the employees of the Petitioner No.1, without recording a finding that the real employer of the workmen was the Petitioner No.2-Union of India, a direction for their absorption in the service of the Union of India was

impossible. An inquiry into the question as to whether the real employer of the workmen is Union of India in terms of the judgment referred to above was not possible without the appropriate government making a reference to that effect.

12. So far as the Petitioner No.1 is concerned, the Industrial Tribunal has observed in its order that canteen was closed from 1996 and after recording a finding that in terms of the memorandum issued by Union of India the workmen are entitled to be absorbed in the service of Union of India the order for absorption has been made. The Industrial Tribunal has nowhere recorded a finding whether the establishment of the Petitioner No.1 company continues or not. In the petition, the Petitioner No.1 has categorically stated that the Thorium plant of the Petitioner No.1 has been closed from 1-4-1998 and therefore, there is no question of running any canteen for the employees of Thorium Plant and hence absorption of the workmen by the Petitioner No.1 is not possible. Though it is tried to be urged on behalf of the workmen that some other Plants of the Petitioner No.1 are functioning the learned Counsel appearing for the workmen is not in a position to

point out any averment made by the workmen to that effect. In any case, whether there is any other Plant of the Petitioner No.1 working is a question of fact, in the absence of any finding recorded by the Tribunal, this court can not for the first time hold an inquiry into that question of fact and record a finding of fact.

13. Taking overall view of the matter, therefore, it appears that in the absence of recording a clear finding that the work is available with the Petitioner No.1, the Industrial Court was not at all justified in issuing a direction for absorption of the workmen in the service of the Petitioner No.1.

14. In the result, therefore, petition succeeds and is allowed. Rule is made absolute in terms of prayer clause (a). No order as to costs.

At this stage a request is made on behalf of the workmen that the operation of this order should be stayed for a period of eight weeks. In my opinion, no useful purpose will be served by granting stay of operation of this order. The only interim order that was made on 11-2-2004 in this petition reads as

under:-

> Heard the learned Advocate for the Petitioners and the respondent No.1. Leave to amend the petition.
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> Rule. Interim relief in terms of the prayer clause (b). However, it is clarified that this stay shall not entitle the petitioners to change the status quo in relation to the payment which the Petitioners are stated to be making as subsidy.
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> Learned Advocate appearing on behalf of the respondent No.1 waives service.

By this order interim order in terms of prayer clause (b) is granted. Prayer clause (b) reads as under:-

> (b) that pending the hearing and final disposal of the Petition, this Hon’ble Court be pleased to stay the impugned order.

By the interim order dated 11-2-2004 operation of the award passed by the tribunal was stayed and it was

clarified that if under any previous order made by any court or authority any payment is being made to the workers then because of the interim order passed by this Court the Petitioners will not change that position. The learned Counsel appearing for the workmen is not in a position to point out any order passed by any court or tribunal which directs the Petitioner to make any payment to the workmen. In this view of the matter, therefore, in my opinion, no useful purpose will be served by staying the operation of the judgment. A request is, therefore, rejected.

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